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Current Issues in the Law of Discrimination and Miners' Rights Under the Federal Mine Safety & Health Act of 1977

BY THOMAS C. MEANS, ESQ.*

INTRODUCTION

The mining industry is subject to a unique set of labor law requirements. Not only are miners protected by the gamut of anti-discrimination¹ and labor² laws which protect most other workers, but they are also the beneficiaries of a broad array of additional rights under the Federal Mine Safety and Health Act of 1977 (Act or Mine Act).³

Section 105(c)⁴ of the Act sets forth both the substantive and procedural components of the Act's anti-discrimination provi-

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¹ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1982).

² See, e.g., National Labor Relations Act of 1935, 29 U.S.C. § 151 (1982).

³ Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977) (codified at 30 U.S.C. §§ 801-962 (1982)).

⁴ Codified at 30 U.S.C. § 815(c) (1982). Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published

sions.⁵ It broadly prohibits any interference with the exercise of miners' rights under the Act.⁶ It also prohibits discrimination against any miner, applicant for employment, or representative of miners based on his exercise of those rights.⁷ It does not prohibit discrimination against them in general, but only that discrimination which is motivated by the exercise of those rights.⁸ Generally, the exercise of those rights is referred to as "protected activity."⁹ The Act charges the Secretary of Labor with enforcing the Act's anti-discrimination provisions, which is done through the Mine Safety and Health Administration (MSHA) and the Office of the Solicitor of Labor (Solicitor).¹⁰

This area of mining law is among the most active and unsettled. Because of the strong rights miners enjoy under the Act, including the right to disobey direct work orders under certain circumstances, and because these rights have been coupled with an aggressive MSHA enforcement posture, this area of the law has been highly controversial. As with much that is controversial in our society, Mine Act discrimination law has spawned considerable litigation. When the Bureau of National Affairs surveyed the 1986 cases in which the decisions of the Federal Mine Safety & Health Review Commission (Commission)¹¹ had been chal-

pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Mine Act § 105(c), 30 U.S.C. § 815(c) (1982).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Mine Act § 105(c)(2)-(3), 30 U.S.C. § 815(c)(2)-(3) (1982).

¹¹ The Federal Mine Safety and Health Review Commission is an independent agency of the United States Government created by Section 113 of the Mine Act to adjudicate Mine Act disputes. 30 U.S.C. § 823(a) (1982). It consists of five commissioners appointed by the President and confirmed by the Senate and it operates through a cadre of administrative law judges, located in Falls Church, Virginia and Denver, Colorado, who issue initial decisions which are subject to Commission review. Mine Act § 113(a)-(e), 30 U.S.C. § 823(a)-(e) (1982). The Commission's rules of procedure are published at 29 C.F.R. § 2700 (1982). Appeals from decisions of the Commission lie in the federal

lenged and were pending in the United States Court of Appeals, it found that 80 percent of those appellate cases were discrimination cases.¹²

This is a law being shaped more in the crucible of the courtroom than in the committees of Congress. Since this largely judge-made body of law is in such an evolutionary ferment, this Article is intended to assist mineral law practitioners in two ways: (1) by providing a summary overview of some of the current provisions of that law,¹³ and (2) by highlighting the current controversies and recent developments in those areas of the law.

I. THE ANALYTIC SCHEME OF THE ACT

A case of discrimination under the Mine Act involves three basic elements. First, there must be involved one or more individuals who are members of a protected class under the Act.¹⁴ Second, one or more individuals must have exercised some right afforded by the Mine Act.¹⁵ Third, as a result of that protected activity, someone else must have engaged in a prohibited act.¹⁶ All three elements must be presented for a claim to lie under section 105(c).

A. *The Protected Class*

The boundaries of the class of persons protected against discrimination under the Act have been relatively stable since section 105(c) was enacted in 1977. Three types of persons come

court of appeals for the circuit where the mine is located or in the U.S. Court of Appeals for the District of Columbia Circuit. Mine Act § 106(a)-(b), 30 U.S.C. § 816(a)-(b) (1982).

¹² *Current Report*, MINE SAFETY AND HEALTH REP. (BNA) 456 (April 16, 1986).

¹³ This article follows the organizational scheme of section 105.02 of Means, *Discrimination and Miners' Rights Under the Federal Mine Safety and Health Act of 1977*, KENTUCKY MINERAL LAW (1986) and discusses developments subsequent to those addressed there. For the convenience of the reader, periodic cross-references to that more comprehensive study are provided.

¹⁴ Means, *supra* note 13, at 43.

¹⁵ *Id.*

¹⁶ *Id.*

within the protected class: miners, representatives of miners, and applicants for employment.¹⁷

The Act broadly defines "miner" to include any person working in a coal or other mine.¹⁸ This definition is coupled with the even broader definition of "coal or other mine."¹⁹ When applying these inclusive definitions in accordance with the congressional mandate that the Act be broadly construed,²⁰ it becomes apparent that the Act's protection against discrimination is expansive. For example, in one case, a secretary in an office on mine property was held to be a miner protected from discrimination under the Mine Act.²¹

In light of the Act's broad remedial purpose, the recent decision in *Paul v. PB-KBB*,²² came as a surprise to many observers. In *Paul*, which the United States Court of Appeals for the D.C. Circuit upheld, the Commission reversed an ad-

¹⁷ Mine Act § 105(c)(1), 30 U.S.C. § 815(c)(1) (1982). See Means, *supra* note 13, at 43-45.

¹⁸ Mine Act § 3(g), 30 U.S.C. § 802(g) (1982).

¹⁹ Mine Act § 3(h)(1), 30 U.S.C. § 802(h)(1) (1982). "Coal or other mine" is defined as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Id.

²⁰ S. REP. NO. 181, 95th Cong., 1st Sess. 14, reprinted in 1977 U.S. CODE & ADMIN. NEWS 3401, 3414 ("[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly (sic) interpretation.").

²¹ *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958 (D.C. Cir. 1984).

²² *Paul v. PB-KBB, Inc.*, 7 F.M.S.H.R.C. 1784 (1985), *aff'd sub nom. Paul v. Federal Mine Safety and Health Review Comm'n*, 812 F.2d 717 (D.C. Cir. 1987).

ministrative law judge's (ALJ) decision that a mining engineer designing a mine shaft was a "miner" under the Act.²³ The engineer was discharged when he complained of violations of MSHA's mandatory ventilation standards in a preliminary design for an exploratory shaft.²⁴

In *Paul*, the Commission rejected the ALJ's ruling that the Houston office where the complainant worked in designing the shaft of a nuclear waste storage facility was a mine within the literal meaning of the definition in the Act.²⁵ The Commission majority concluded that the ALJ had gone too far, ruling that the Houston office during the period of the complainant's activity was not part of a "mine," and that the mine was merely a design on a drawing board.²⁶ Importantly, the Commission added that, in its view, the complainant's work "in drafting a preliminary engineering design for an experimental nuclear storage facility clearly [was] not the type of activity that Congress intended to be regulated by the Mine Act."²⁷ The Commission stated that "the facilities and equipment of the subject engineering firm designing a storage facility for nuclear waste [were] not entities 'in use in connection with mining activities' and summarized its holding simply: 'no mine, no miner, no Mine Act coverage.'"²⁸

A concurring Commissioner questioned the *Paul* majority's opinion for assigning controlling weight to the fact that the project at issue was only in a preliminary design stage with no actual construction having yet been undertaken.²⁹ Given the broad remedial purpose of the Act,³⁰ the concurring Commissioner was not willing to rule that a cause of action does not arise under the Mine Act when a person alleges that he has voiced safety concerns over the design of a structural facility to be used in mining and has been retaliated against because of those safety

²³ *Id.*

²⁴ *Id.* at 1786.

²⁵ *Id.* at 1787.

²⁶ *Id.* at 1787-88.

²⁷ *Id.* at 1788.

²⁸ *Paul*, 7 F.M.S.H.R.C. at 1790.

²⁹ *Id.*

³⁰ See notes 18-21 and accompanying text.

concerns.³¹ Instead, the concurrence stated that the "inquiry [is] not only into whether the operation performs one or more of the . . . work activities [listed in the Mine Act's definition of mine] but also into the *nature* of the operation performing such activities."³² The Commissioner explained that the operation in question—the construction of an underground nuclear waste storage facility for the federal government—compelled the conclusion that the facility was not yet, and never would be, a mine within the meaning of the Mine Act.³³

The court of appeals affirmed, ruling that neither the Houston office nor the prospective shaft which was being designed were a "mine" and that, therefore, the complainant could not be a "miner" or a "representative of miners" entitled to bring an action under section 105(c).³⁴ The court acknowledged that the Act and its own precedents require that the term "mine" be read expansively, but concluded that interpreting the Act to cover the activities in question would "stretch[] the language of the Act beyond its breaking point."³⁵ The court ruled that a mine does not exist under the Act prior to the commencement of mineral extraction or construction activities.³⁶ Without deciding whether the shaft, once constructed, would be a mine, the court flatly ruled that:

Preliminary engineering and design activities are not covered by the Mine Act. . . . Conceptual designs do not endanger lives or property; any hazards they pose, prior at least to their final approval or the initial stages of their implementation, are purely hypothetical. The Act was not designed to regulate *ideas*.³⁷

Thus, as broad as the Mine Act's grant of jurisdiction may be, the *Paul* case reaffirms that there remain some limits on that

³¹ *Paul*, 7 F.M.S.H.R.C. at 1791.

³² *Id.* at 1790 (emphasis added).

³³ *Id.*

³⁴ *Paul v. Federal Mine Safety and Health Review Comm'n*, 812 F.2d 717, 720 (D.C. Cir. 1987), *aff'g sub nom. Paul v. PB-KBB*, 7 F.M.S.H.R.C. 1784 (1985).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

jurisdiction. Not everyone can maintain a section 105(c) complaint.

B. Protected Activities

The greatest ferment in the law of Mine Act discrimination has been occurring in the realm of "protected activities." Under the Mine Act, any interference with the exercise of any right afforded to miners, representatives of miners, or job applicants, including any adverse action taken against such an individual on account of the exercise of such rights, constitutes unlawful discrimination.³⁸ The Act affords many types of well established rights. The boundaries of those rights and the preconditions for their invocation, however, remain unsettled in many respects. A number of recent cases have wrestled with the proper location of those boundaries and preconditions in several areas. Recent developments are surveyed in the discussions which follow.

1. Walkaround

A miners' representative is entitled to accompany MSHA inspectors during physical inspections of each mine for the purpose of assisting in the enforcement of the Mine Act's mandatory standards.³⁹ If the representative is an employee of the mine operator, the Act provides that the operator shall pay him his regular compensation for time spent on walkaround activities.⁴⁰ As well established as this walkaround right has become, its controversial nature continues to inspire considerable litigation.

a. Compensation for Post-Inspection Conferences

The Act clearly establishes the right of a miner representative to participate in pre or post-inspection conferences held by the MSHA inspector at the mine.⁴¹ There has been uncertainty, however, regarding whether the representative's right to com-

³⁸ Mine Act § 105(c)(1), 30 U.S.C. § 815(c)(1) (1982). See *supra* note 4 for full text of section.

³⁹ Mine Act § 103(f), 30 U.S.C. § 813(f) (1982). See Means, *supra* note 13, at 46-47.

⁴⁰ Mine Act § 103(f), 30 U.S.C. § 813(f) (1982).

⁴¹ *Id.*

pensation extended to such activities and, if so, to which types of conferences. In *Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Comm'n*,⁴² an ALJ agreed with the union's position that Congress intended miners' representatives be compensated for their time participating in pre and post-inspection conferences, which are held at the mine immediately or shortly after the completion of the inspection as part of the walkaround process.⁴³ However, the mine operator's challenge to MSHA citations was upheld. The citations were issued for failure to compensate miners' representatives who attended post-inspection conferences conducted pursuant to 30 C.F.R. § 100.6(a) of MSHA's civil penalty assessment regulations but who had not accompanied the MSHA inspectors during the inspection.⁴⁴ In ruling that the miners' representatives were not entitled to compensation for these activities under the Act's walkaround right, the judge stressed that the conferences: (1) took place long after the completion of the inspections and the abatement of the violations; (2) were focused on the propriety of the inspectors' findings made in conjunction with citations issued during the inspection, which findings formed the basis for MSHA's civil penalty assessment; and (3) were participated in by different miners' representatives than those who accompanied the inspectors.⁴⁵

On review, the Commission affirmed the ALJ's decision to the extent that it upheld the right of miners' representatives to be compensated for participating in pre and post-inspection conferences. However, the Commission reversed the judge's ruling that participation in the 30 C.F.R. § 100.6(a) post-inspection conferences was not compensable.⁴⁶ Although the discussions at the conference related in part to the civil penalty assessment function, the Commission also found that they related directly to the enforcement of the Mine Act through the inspection process and thus to safety and health issues, stating:

⁴² 8 F.M.S.H.R.C. 295 (1986), *aff'd*, *Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Comm'n* (6th Cir. 1987) (unpublished).

⁴³ *Id.* at 297.

⁴⁴ *Id.* at 297-98.

⁴⁵ *Id.* at 298-300.

⁴⁶ *Id.* at 299-300.

The participation of the miner representative [sic] in the post-inspection conferences and the resulting discussions of the violations could assist inspectors in carrying out their enforcement responsibilities and increased miner and operator awareness of the conditions which resulted in the cited violations.⁴⁷

The delay between the inspections and the post-inspection conferences and the fact that the participants in the conferences were not the representatives who had accompanied the MSHA inspectors did not "change the compensable character of the conferences."⁴⁸ According to the Commission, the proper inquiry is whether the substance of the post-inspection conference advanced the goals of enabling miners to understand the safety and health requirements of the Act and enhanced miner safety and health awareness, as well as apprised miners more fully of the inspection results.⁴⁹

b. Special Accommodations for Walkaround Representatives

In *Secretary of Labor on behalf of Richard Truex v. Consolidation Coal Co.*,⁵⁰ a mine operator was held to have unlawfully discriminated against a miners' representative by failing to make special accommodations in his work assignments in order to permit him to serve as the miners' representative at a meeting with an MSHA inspector.⁵¹ The miner had been designated to serve as the miners' representative at an upcoming post-inspection meeting.⁵² The miner asked the operator to notify him when the MSHA inspector arrived so that in the meantime he could proceed to work underground with his regular crew until the meeting, or to be given alternative work in an area that would allow him to be readily available for the meeting.⁵³ Since the mine operator refused to accommodate the miner in either respect, the Secretary filed a discrimination complaint citing the operator for violating the miners' walkaround right.⁵⁴

⁴⁷ *Southern Ohio Coal Co.*, 8 F.M.S.H.R.C. 295, 300.

⁴⁸ *Id.* at 300 n.2.

⁴⁹ *Id.* at 300.

⁵⁰ 8 F.M.S.H.R.C. 1293 (1986).

⁵¹ *Id.*

⁵² *Id.* at 1295.

⁵³ *Id.*

⁵⁴ *Id.*

The Commission held that the mine operator's refusal to accede to the miners' representative's wishes "denied miners their choice of representative at the conference."⁵⁵ In the Commission's view, the mine operator discriminated against the miner by preventing him from acting as a miners' representative without having to declare himself first on union business and thus to suffer a loss of pay as a result. The Commission based its ruling on "Congressional recognition that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights . . . [and that] reasonable work adjustments [were] required under section 103(f) to fully effectuate that section's participation rights."⁵⁶

Ironically, in another recent case, MSHA filed a discrimination complaint against a different mine operator for doing what *Truex* said was discriminatory not to do.⁵⁷ MSHA charged that the operator's assignment of a walkaround representative to alternative work in order to facilitate his walkaround duties was an improper adverse action (because the miner preferred his normal duties) taken against a miners' representative on account of his walkaround rights.⁵⁸ The case was settled before the Commission had to resolve the tension between *Truex* and MSHA's apparently inconsistent discrimination theory.⁵⁹

c. Which Miners' Representatives Are Entitled to Walkaround Rights?

Although the general principle is that the representative chosen by the miners is entitled to walkaround with MSHA inspectors,⁶⁰ several recent cases have arisen from mine operators' contentions that this right is not unlimited. In *Emery Mining Corp. v. Secretary of Labor, Mine Safety and Health Admin.*,⁶¹ an ALJ held that the mine operator violated section 103(f) of

⁵⁵ *Id.* at 1298.

⁵⁶ *Consolidation Coal*, 8 F.M.S.H.R.C. at 1299.

⁵⁷ *Secretary of Labor on Behalf of Sam Ball v. Westmoreland Coal Co.*, 9 F.M.S.H.R.C. 116 (1987).

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ *Consolidation Coal*, 8 F.M.S.H.R.C. at 1298.

⁶¹ 8 F.M.S.H.R.C. 1182 (1986).

the Act in refusing to permit a non-employee international union representative to accompany an MSHA inspector on a regular underground coal mine inspection. The operator defended against the MSHA citation by claiming: (1) that the Act did not require that a non-employee miners' representative be given access to the mine for walkaround purposes;⁶² (2) that even if a non-employee miners' representative otherwise had a right of access the mine operator nonetheless had the right to exclude him when he refused to comply with the reasonable precondition of signing a waiver of liability which was required of all visitors to the mine;⁶³ and (3) that, in any case, the non-employee representative had not complied with MSHA regulations which require filing with MSHA as a walkaround representative and that an employee miner representative had been permitted to walkaround with the inspector.⁶⁴ The ALJ's decision rejecting each of the mine operator's defenses is currently on appeal.⁶⁵

In the meantime, another ALJ concurred with the ruling that miners' representatives are entitled to accompany MSHA inspectors regardless of whether or not they are employed by the mine operators, and went further still.⁶⁶ In *Secretary of Labor on behalf of Barry Mylan and Lester Poorman v. Benjamin Coal Co.*,⁶⁷ the ALJ held not only that the miners' representative need not be employed by the mine operator, but also that he did not have to represent the majority of miners at the mine.⁶⁸

In *Benjamin*, the work force had recently voted in an NLRB—conducted election against having United Mine Workers of America (UMWA) representation.⁶⁹ Nevertheless, four out of the more than 500 workers at the mine filed with MSHA designating the UMWA as their walkaround representative.⁷⁰ When the non-

⁶² *Id.* at 1182-83, 1202-05.

⁶³ *Id.* at 1182-83, 1205-07.

⁶⁴ *Id.* at 1207-08.

⁶⁵ Petition for review granted, in September, 1986 (unpaginated table, 8 F.M.S.H.R.C. Vol. 9).

⁶⁶ *Secretary of Labor on Behalf of Barry Mylan and Lester Poorman v. Benjamin Coal Co.*, 9 F.M.S.H.R.C. 27 (1987).

⁶⁷ *Id.*

⁶⁸ *Id.* at 52.

⁶⁹ *Id.* at 29.

⁷⁰ *Id.* at 29-30.

employee UMWA representatives attempted to accompany an MSHA inspector on a mine inspection, they were ordered off of the mine property by the operator.⁷¹ They filed discrimination charges with MSHA.⁷² The ALJ upheld the complaint of discrimination, assessed a civil penalty against the mine operator, and ordered the operator to cease and desist from interfering with the right of the UMWA officials to accompany MSHA inspectors as walkaround representatives during mine inspections.⁷³

The ALJ ruled that the concept of miners' representative was different under the Mine Act than under the National Labor Relations Act and that there was no requirement under the former that a miners' representative represent all or even most of the miners.⁷⁴ The judge did not address the potential impracticality and unworkability of his holding: if any two miners can choose their own representative to walkaround with the MSHA inspector, hundreds of walkaround representatives could claim the right to accompany each MSHA inspector. It is hard to imagine that Congress could have intended such a bizarre result.⁷⁵

2. *Transfer to a Less Dusty Place*

Miners who demonstrate evidence that they are suffering from pneumoconiosis are entitled to transfer to a position in some other, less dusty area of the mine.⁷⁶ In order to encourage miners to exercise this right, Congress provided that miners would suffer no loss in pay upon such a transfer.⁷⁷ Although MSHA has implemented this right in detailed regulations promulgated under 30 C.F.R. Part 90,⁷⁸ numerous unanswered ques-

⁷¹ *Id.* at 30.

⁷² *Benjamin*, 9 F.M.S.H.R.C. at 32.

⁷³ *Id.* at 53-54.

⁷⁴ *Id.* at 51-52.

⁷⁵ See, e.g., 30 U.S.C. § 813(e) (congressional intent to avoid unreasonable burden on mine operators).

⁷⁶ Mine Act § 203(b)(1)-(2), 30 U.S.C. § 843(b)(1)-(2) (1982). See Means, *supra* note 13, at 48-49.

⁷⁷ Mine Act § 203(b)(3), 30 U.S.C. § 843(b)(3) (1982).

⁷⁸ 30 C.F.R. §§ 90.1-.220 (1986).

tions continue to arise concerning the breadth and implications of the transfer right. The Commission has not shown any great interest in forging into the breach. In ruling that a miner who had filed a request to be classified as a "Part 90" miner but had not yet been so classified was entitled to protection against discrimination based on his prospective Part 90 status, the Commission recently acknowledged: "[t]his case does not require us to articulate the full extent of the protection afforded Part 90 miners by section 105(c) or to identify every form of discrimination that may arise in this context."⁷⁹

This troublesome uncertainty as to the scope of Part 90 rights is well illustrated by two conflicting 1986 ALJ decisions. In *Lady Jane Collieries, Inc. v. Secretary of Labor, Mine Safety and Health Admin.*,⁸⁰ MSHA cited a mine operator for violating Part 90 by failing to maintain the prior pay levels of two Part 90 miners who were transferred to other jobs.⁸¹ The ALJ vacated the MSHA citations because he found that the transfers were the result of a legitimate, good faith reorganization and reduction in force, having nothing to do with the miners' exposure to hazardous dust levels or any discrimination against them based upon their Part 90 status.⁸² In a well-reasoned opinion, the judge held that the statute requires that a miner's pay be maintained at pre-transfer levels only when the miner is transferred as a result of his exposure to hazardous levels of dust.⁸³ The judge ruled that:

MSHA's argument that Part 90 recognizes no exceptions with respect to the reasons for a miner's transfer IS REJECTED. I find nothing in the legislative history to suggest that Congress intended that an eligible Part 90 miner or potential transferee be forever insulated from the economic realities of the mining business. Nor do I find anything to suggest that a mine operator must forever guarantee a miner's wages in any subsequently acquired jobs which may come about as a result of changed economic circumstances.⁸⁴

⁷⁹ Goff v. Youghioghney & Ohio Coal Co., 7 F.M.S.H.R.C. 1776, 1781 (1985).

⁸⁰ 8 F.M.S.H.R.C. 157 (1986).

⁸¹ *Id.*

⁸² *Id.* at 177, 178.

⁸³ *Id.* at 176-77.

⁸⁴ *Id.* at 176.

Before the year was out, another ALJ ruled to the contrary. In *Secretary of Labor on behalf of John W. Bushnell v. Can-nelton Industries*,⁸⁵ MSHA charged an operator with discriminating against a Part 90 miner when the mine operator, due to economic conditions, transferred the miner to a lower paying job as a result of a realignment in the workforce.⁸⁶ This transfer came four years after the Part 90 miner had been transferred to a less dusty job.⁸⁷ Reading MSHA's regulations literally, without consideration of the underlying policy issues, the judge held that the operator discriminated when it reduced the rate of pay of the Part 90 miner.⁸⁸ The judge did not articulate why a Part 90 miner should not remain subject to the non-discriminatory vicissitudes of the economy or the mining industry which govern the destinies of his non-Part 90 colleagues, or otherwise provide an explanation for his decision.

Thus, the Part 90 transfer provisions remain a fertile source for disputes between mine operators, miners, and mine safety regulators. It is obvious that there remain some fundamental unsettled issues. The Commission must soon find an occasion to address those issues in order to provide much needed guidance.

3. *Idlement Compensation*

Section 111 of the Mine Act requires mine operators to compensate miners idled because a mine or part of a mine is closed by a withdrawal order issued under sections 103, 104, or 107.⁸⁹ In addition to compensation for the period of idlement including the balance of the shift and up to four hours of the next shift, miners are also entitled to compensation for the entire period of the idlement, up to a full week, if the idlement resulted from a section 104 or 107 closure order issued for a mandatory safety or health standard violation.⁹⁰

⁸⁵ 8 F.M.S.H.R.C. 1607 (1986) (review pending).

⁸⁶ *Id.* at 1608.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1608-09.

⁸⁹ Mine Act § 111, 30 U.S.C. § 821. See Means, *supra* note 13, at 49-50.

⁹⁰ Mine Act § 111, 30 U.S.C. § 821.

Until recently, based on the decisions of each of the three administrative law judges who had ruled on the issue, miners were not entitled to the full week's compensation where MSHA did not allege a violation of a mandatory safety and health standard in the initial closure order itself.⁹¹ This was true regardless of whether a violation may in fact have caused the condition which led MSHA to issue the closure order.⁹² In three decisions issued on September 26, 1986,⁹³ the Commission reversed all three administrative law judges.

Reading the Act broadly in light of its remedial purposes, the Commission ruled in the lead decision, *Local Union 1889, District 17 UMWA v. Westmoreland Coal Co.*⁹⁴ that the

*form in which the violation of a mandatory standard is cited—whether in a section 104(d) citation or order in a section 104(a) citation—is not controlling for compensation purposes. . . . The essential question is one of causality, not procedural format: Was the [closure] order issued because of underlying conditions involving a violation of mandatory standards?*⁹⁵

Thus, if the answer to this question was affirmative, the claim for compensation would be valid even if no mandatory standards violations had been cited in the closure order nor, presumably, cited anywhere.⁹⁶

The Commission also held in *Westmoreland* that a right to idlement compensation would obtain even where the miners were not in fact idled by an order issued under section 104 or section 107 of the Act, as provided in section 111.⁹⁷ The Commission

⁹¹ *Local Union 1889, District 17, UMWA v. Westmoreland Coal Co.*, 6 F.M.S.H.R.C. 292 (1984) (Steffey ALJ), *rev'd*, 8 F.M.S.H.R.C. 1317 (1986); *Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 6 F.M.S.H.R.C. 1782 (1984) (Moore ALJ), *rev'd*, 8 F.M.S.H.R.C. 1310 (1986); *Local Union 1609, District 2, UMWA v. Greenwich Collieries*, 6 F.M.S.H.R.C. 2465 (1984) (Koutras ALJ), *rev'd*, 8 F.M.S.H.R.C. 1302 (1986).

⁹² See *supra* note 91.

⁹³ *Local Union 1889, District 17, UMWA v. Westmoreland Coal Co.*, 8 F.M.S.H.R.C. 1317 (1986); *Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 8 F.M.S.H.R.C. 1310 (1986); *Local Union 1609 District 2, UMWA v. Greenwich Collieries*, 8 F.M.S.H.R.C. 1302 (1986).

⁹⁴ 8 F.M.S.H.R.C. 1317 (1986).

⁹⁵ *Id.* at 1329-30 (emphasis in original).

⁹⁶ *Id.*

⁹⁷ *Id.*

noted that they had already been idled by an order issued under section 103 of the Act at the time when the section 104 or 107 order was ultimately issued.⁹⁸

A different kind of idlement compensation question was raised in *Local Union No. 5817, District 17, UMW v. Monument Mining Corp. and Island Creek Coal Co.*,⁹⁹ where the focus was not on the preconditions for liability under section 111, but rather on *who* may be liable for that compensation obligation.¹⁰⁰ A mine owner had entered into a management contract with an independent contractor under which the contractor had complete control and management of the mine. The miners were also employees of the contractor.¹⁰¹ Because of the contractor's alleged violation of MSHA blasting regulations, a withdrawal order was issued to the contractor under section 104(d) of the Act, idling the miners for several days.¹⁰² The contractor subsequently went out of business. In the face of the contractor's default in the miners' compensation claim litigation, an ALJ allowed the miners to amend their complaint to name the mine owner as a respondent.¹⁰³ The judge's subsequent decision awarding the miners compensation only against the con-

⁹⁸ *Id.* The Commission stated:

We find nothing in the statute or in its legislative history to suggest that an existing section 103 order precludes the issuance of a valid and effective section 107(a) order either for purposes of mine safety or compensation entitlement under the third sentence of section 111. We therefore conclude that the chronological sequence in which the section 103 and 107(a) orders were issued is not determinative of the miners' right to compensation under the third sentence of section 111. In light of the graduated compensation scheme of section 111, imputation of preclusive effect to the initial section 103 control order would effectively frustrate the obvious intent of Congress to provide for expanded one-week compensation beyond the more limited shift compensation available under the first two sentences of the section. Stated otherwise, we believe that Congress did not intend section 103 control orders, usually issued first in time under exigent circumstances, to have compensation-precluding effects. The focus, as stated above, is upon the conduct of the operator and the conditions in the mines, not the sequencing of MSHA enforcement activity.

Westmoreland Coal, 8 F.M.S.H.R.C. at 1326-27.

⁹⁹ 9 F.M.S.H.R.C. 209 (1987), *appeal docketed* No. 87-1136 (D.C. Cir. 1987).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 209-10.

¹⁰² *Id.* at 210.

¹⁰³ *Id.* at 211.

tractor, and not against the mine owner, was upheld by the Commission.¹⁰⁴

Rejecting the union's claim that liability should be joint and several between mine owner and independent contractor, the Commission ruled that the "plain meaning of section 111 of the Mine Act, as well as the Act's overall purpose, established that the 'operator' responsible for the conditions or violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners."¹⁰⁵ Acknowledging that the mine owner, as well as the independent contractor operator could be cited for the violation itself under the Mine Act, the Commission ruled nonetheless, that compensation determinations must focus upon the conduct of the operator responsible for the conditions at the mine.¹⁰⁶ The Commission also noted that the Act's remedial purposes are best effectuated if the operator responsible for the violation is also held responsible for any compensation claim from its employees arising from such violations.¹⁰⁷

As the foregoing cases suggest, idlement compensation law is still in its infancy. Recent activity indicates that this will be one of the most fertile areas for labor-management conflict in the Mine Act arena in coming years.

4. *Refusals to Work*

A miner has the right to refuse to work in the face of unusual hazards.¹⁰⁸ The dimensions of this right are nowhere spelled out in the Act, the legislative history, or MSHA's regulations, leaving their complete development to case-by-case adjudication.¹⁰⁹ Although the courts and the Commission have imposed certain preconditions on the exercise of this right,¹¹⁰ its generally amor-

¹⁰⁴ *Id.*

¹⁰⁵ *Monument Mining*, 9 F.M.S.H.R.C. at 211-13.

¹⁰⁶ *Id.* at 211-12.

¹⁰⁷ *Id.* at 212.

¹⁰⁸ See, e.g., *Miller v. Federal Mine Safety and Health Review Commission*, 687 F.2d 194 (7th Cir. 1982). See also Means, *supra* note 13, at 50-51.

¹⁰⁹ Biddle, Means, & Levine, *Protected Work Refusals Under Section 105(c)(1) of the Mine Safety and Health Act*, 89 W. VA. L. REV. 629 (1987).

¹¹⁰ In sum, the miner must have a good faith, reasonable belief that a hazardous condition exists and must ordinarily communicate that belief to a representative of the operator. See Biddle, Means, & Levine, *supra* note 109.

phous nature continues to spawn considerable litigation. There have, however, been no recent significant changes in this aspect of the law. In fact, the Commission recently reversed the decision of an ALJ who sought to liberalize the threshold requirements that must be satisfied before a work refusal will be protected under the Mine Act; the Commission expressly reaffirmed those prerequisites for a protected work refusal under section 105(c).¹¹¹

There has been considerable recent decisional activity concerning the boundaries of the Act's protected activities and the preconditions for their exercise. Much remains unsettled in this area, and a continued case-by-case development should be expected.

C. *Prohibited Acts*

It is unlawful discrimination under the Mine Act for any person to interfere with a miner's exercise of his rights under the Mine Act or to discipline, suspend, discharge, or take any other adverse action against a miner because of a protected activity.¹¹² This element of discrimination remains a *sine qua non* of a successful section 105(c) cause of action under the Mine Act.¹¹³ Although the Commission has gone so far as to recognize that the adverse action may be a constructive one, not necessarily a formal and overt action,¹¹⁴ it has declined to go further and allow a successful claim of constructive discharge without a showing of discriminatory motive.¹¹⁵

In *Simpson v. Kenta Energy, Inc.*,¹¹⁶ the Commission reversed an ALJ ruling that a miner had been constructively discharged in violation of the Mine Act.¹¹⁷ The miner had quit his job in the face of admittedly hazardous and unlawful working

¹¹¹ *Simpson v. Kenta Energy, Inc.*, 8 F.M.S.H.R.C. 1034 (1986), *rev'g* 7 F.M.S.H.R.C. 1454 (1984) (D.C. Cir. 1986) (appeal docketed No. 86-1441) (Broderick ALJ).

¹¹² Mine Act § 105(c)(1), U.S.C. § 815(c)(1) (1982). For full text of this section, see *supra* note 4. See also Means, *supra* note 13, at 52.

¹¹³ See, e.g., *Smith v. Reco, Inc.*, 9 F.M.S.H.R.C. 992, 994 (1987).

¹¹⁴ *Rosalie Edwards v. Aaron Mining*, 5 F.M.S.H.R.C. 2035 (1983).

¹¹⁵ *Simpson v. Kenta Energy, Inc.*, 8 F.M.S.H.R.C. 1034 (1986) (D.C. Cir. 1986) (appeal docketed No. 86-1441).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

conditions. There was, however, no evidence that the operator was motivated either to create or to maintain those working conditions *because of* the miner's exercise of any rights protected by the Mine Act.¹¹⁸ Although the Commission recognized the existence of case law under Title VII¹¹⁹ not requiring proof of retaliatory motive, it refused to incorporate that concept into the Mine Act because "section 105(c) of the Mine Act essentially is an anti-retaliation provision" and requires proof of a retaliatory motive before a constructive discharge will be found.¹²⁰ Although the miner had the right to complain about the unsafe conditions and was under no obligation to continue working, his quitting was not a constructive discharge in violation of the Act because the adverse conditions were not maintained in order to retaliate against the miner for protected activity.¹²¹

Despite the ferment and rapid development of so many aspects of miners' rights and discrimination law, it is apparent that the requirement of a prohibited act remains firm. The Commission is not willing to dispense with that prerequisite to a cause of action. No matter how unfair the operator may have been, he will not be deemed to have discriminated under the Mine Act unless he was unfair in retaliation for protected activity.

D. Complaint, Investigation, and Adjudication Procedures

Miners who believe that they have been discriminated against because of their protected activities may file a complaint with MSHA.¹²² If MSHA then concludes that the complaint lacks merit, the miner may proceed to file and prosecute his own discrimination case before the Commission.¹²³ In order to assure that the complaint is handled expeditiously, the Act requires MSHA to first investigate the complaint and imposes certain

¹¹⁸ *Id.* at 1038, 1040-41.

¹¹⁹ 42 U.S.C. § 2000(e) (1982).

¹²⁰ *Simpson*, 8 F.M.S.H.R.C. at 1040.

¹²¹ *Id.* at 1038, 1040-41.

¹²² 30 U.S.C. § 815(c)(2).

¹²³ Mine Act § 105(c)(2)-(3), 30 U.S.C. § 815(c)(2)-(3) (1982). See Means, *supra* note 13, at 53-54.

time frames for MSHA's administrative action.¹²⁴ The Commission has recently held, however, that these time frames are not jurisdictional.¹²⁵ Therefore, even if MSHA fails to conclude its investigation of a miner's complaint within the time required by the Act, it may subsequently file a delayed complaint without adverse consequence to the complainant, absent a showing of prejudice to the respondent.¹²⁶

In *Secretary of Labor on behalf of Donald R. Hale v. Four—A Coal Co.*,¹²⁷ the Secretary's delay of over two years in filing a discrimination complaint with the Commission was not itself sufficient to justify dismissal.¹²⁸ The Commission recognized that the Secretary had violated the Act's time constraints imposed on processing the miner's complaint, and that Congress intended the Secretary to follow these requirements and proceed expeditiously.¹²⁹ Yet, the Commission also found that the legislative history was explicit that the miner should not suffer for the Secretary's derelictions.¹³⁰ Accordingly, the Commission held that if the Secretary's complaint is "late-filed, it is subject to dismissal [but only] if the operator demonstrates material legal prejudice attributable to the delay."¹³¹

CONCLUSION

Miners' rights and discrimination law under the Federal Mine Safety and Health Act of 1977 continues to develop at a rapid pace. Cases under section 105(c) of the Act continue to flood the Commission and constitute an inordinately large share of its

¹²⁴ The Secretary is required to commence his investigation within 15 days of the receipt of a complaint of discrimination; to notify the miner of his determination whether § 105(c) has been violated within 90 days; and to immediately file with the Commission a complaint of discrimination if he finds that there has been a violation. Mine Act § 105(c)(2)-(3), 30 U.S.C. § 815(c)(2)-(3) (1982).

¹²⁵ *Secretary of Labor on behalf of Donald R. Hale v. Four-A Coal Co.*, 8 F.M.S.H.R.C. 905 (1986).

¹²⁶ *Id.* at 907-08.

¹²⁷ *Id.* at 905.

¹²⁸ *Id.* at 907.

¹²⁹ *Id.* at 907-08.

¹³⁰ *Id.* at 908 (citing S. REP. No. 181, 95th Cong., 1st Sess. 36 (1977)).

¹³¹ *Four-A Coal*, 8 F.M.S.H.R.C. at 908.

docket. As a service to the practitioner who must keep abreast of such developments, this Article has reviewed some of the most recent developments in this area of the law. The volume of litigation in this relatively virgin specialty area of labor law, however, should put the reader on notice not to stop here. In this field of law, today's recent development is tomorrow's prior case law, and one must vigilantly watch for new developments.

